



Notice of Ex Parte 17-79 – Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment

March 15, 2018

To the Chairman and Commissioners of the FCC,

The Nez Perce Tribe (Tribe) is located in North-Central Idaho, Idaho, with aboriginal territory in Idaho, Montana, Oregon, and Washington. The Tribe has occupied this 15 million acre homeland since time immemorial, and is recognized by the United States as a sovereign nation in the Treaty with the Nez Percés, 1855. The Tribe works with a variety of federal, state, and local agencies on small and large projects in the compliance of federal state, and local laws, including but not limited to, the National Historic Preservation Act (NHP A), National Environmental Policy Act (NEPA), and the Native American Graves Protection and Repatriation Act (NAGPRA). Our Tribe protects irreplaceable sites and locations that are of religious and cultural significance to our people today by continuing the successful collaborative processes that have been established with federal agencies, other Indian tribes, and project developers.

Consultation Process

As a fiduciary, the United States and all its agencies owe a trust duty to the Nez Perce Tribe and other federally-recognized tribes. See *United States v. Cherokee Nation o/Oklahoma*, 480 U.S. 700, 707 (1987); *United States v. Alitchell*, 463 U.S. 206, 225 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). This trust relationship has been described as "one of the primary cornerstones of Indian law," Felix Cohen, *Handbook of Federal Indian Law* 221(1982), and has been compared to one existing under the common law of trusts, with the United States as trustee, the tribes as beneficiaries, and the property and natural resources managed by the United States as the trust corpus. See, e.g., *Mitchell*, 463 U.S. at 225.

The United States' trust obligation includes a substantive duty to consult with a tribe in decision-making to avoid adverse impacts on treaty resources and a duty to protect tribal treaty-reserved rights "and the resources on which those rights depend." *Klamath Tribes v. U.S.*, 24 Ind. Law Rep. 3017, 3020 (D.Or. 1996). The duty ensures that the United States conduct meaningful consultation "in advance with the decision maker or with intermediaries with clear authority to present tribal views to the .decision maker." *Lower Brule Sioux Tribe v. Deer*, 911 F.Supp 395,401 (D. S.D. 1995).

Further, Executive Order 13175 provides that each "agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." According to the President's April 29, 1994 memorandum regarding Government-to-Government Relations with Native American Tribal Governments, federal agencies "shall assess the impacts of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that Tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities." As a result, Federal agencies must proactively protect tribal interests, including those associated with tribal culture, religion, subsistence, and commerce. Meaningful consultation with the Nez Perce Tribe is a vital component of this process.

Consultation is the formal process 'of negotiation, cooperation, and mutual decision-making between two sovereigns: the Nez Perce Tribe (NPT) and the United States (including all federal agencies). Consultation is the process that ultimately leads to the development of a decision, not just a process or a means to an end. The most important component of consultation is the ultimate decision.

Consultation does not mean notifying the Tribe that an action will occur, requesting written comments on that prospective action, and then proceeding with the action. In this scenario the decision is not affected. "Dear Interested Party" letters are not consultation. It is equally important to understand that as a sovereign government, a Tribe may elect not to conduct government-to-government consultation or may decide to limit the scope of their consultation as needed. Importantly, Consultation is initiated between policy-level decision-makers from both the Tribe and the federal agency.

The process conducted by the FCC does not seem to meet this high threshold. The Tribe appreciates the opportunity to comment on the Federal Communications Commission (FCC) January 16, 2018 announcement and invitation to Indian Tribes and Native Hawaiian organizations (NHOs) to participate in conference calls on January 22 and 24 and February 5, and the in-person meeting in Albuquerque, New Mexico, on February 21, 2018, regarding co-location on certain towers. The FCC refers to these conference calls as a continuation of " ... the process of government-to-government consultation on certain issues raised in the NPRM."

The Tribe does not agree that the FCC offering open meetings to tribal representatives, including offering unstructured conference calls on short notice, constitute government-to-government consultation. Nor does mass email messages to hundreds of tribal representatives for a conference call, the first of which is less than one week away constitute government-to-government, or a mass email to Tribes inviting representatives to an in person meeting in three weeks. The Nez Perce Tribe has participated in these calls for informational purposes only, and does not recognize them as formal consultation.

The FCC fails to recognize that formal consultation requires the presence of policy decision-makers from both parties, as well as a mutual agreement to meeting details such as timing, location, and agenda. The FCC announced call and meeting times without discussion with the Tribes, and failed to provide detailed agendas for any of the above before the calls and meetings occurred.

Project Review

The Nez Perce Tribal Historic Preservation Office (THPO) reviews wireless infrastructure projects to ensure compliance with applicable federal laws and protection of the Tribe's

significant historic and cultural resources. We also share the frustration of industry and agency regulators, described in great detail in the *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Second Report and Order*.

This office, however, rejects the repeated assertion that Historic Preservation Reviews, and specifically those conducted by Indian Tribes, are a serious hindrance to the effective and timely deployment of wireless infrastructure. In fact, the Nez Perce THPO generally has positive working relationships with the major carriers on and around the Nez Perce Indian Reservation, Inland Cellular, Verizon Wireless, AT&T, and Sprint. This office has worked with each of these companies to facilitate deployment of towers and co-locations in this region. While these projects have delays and problems, few of the real issues we have experienced would be addressed by the newly proposed rules.

The Tribe has used the current regulations to identify several sites of religious and cultural significance to the Tribe, and to identify adverse effects created by wireless towers and infrastructure. Just as important, however, have been the opportunities to move or modify proposed infrastructure projects to minimize or avoid that damage before it occurs. Contrary to claims that cell towers rarely impact historic properties, the Nez Perce Tribe has identified numerous existing communication towers that were built on traditional cultural properties recognized as historic properties without consultation. Examples of this include Cottonwood Butte and Pilot Knob in Idaho. The Tribe has worked diligently with the wireless industry to mitigate for existing or replacement towers and co-locations on traditional cultural properties such as Mason Butte (*Talmaks*) in Idaho and Steptoe Butte in Washington State, or newly proposed towers, such as at Kamiak Butte in Washington State..

Mason Butte (*Talmaks*) tower constructed by Inland Cellular in 2015 is the most egregious example of a wireless tower causing an adverse effect on the Nez Perce Indian Reservation. This tower was constructed after Tribal staff had identified the site as a traditional cultural property and received concurrence from the FCC. The Tribe, Inland Cellular, FCC, and the ACHP resolved this situation through a Memorandum of Agreement in 2017 that provided compensation to the Tribe to mitigate for the damage. The FCC issued a Finding of No Significant Impact (FONSI), but it is inappropriate to interpret this as a finding that the project had no impact. Instead, the FONSI recognized that the project had caused an adverse impact that was resolved only through completing the mitigation steps in the MOA.

The Nez Perce Tribe much prefers to protect cultural resources through avoidance of damage in the first place. For example, the Tribe has relied deflected numerous proposals to construct wireless communication towers on Pilot Knob, in Idaho County, Idaho, an important location in the Nez Perce creation story and a well-documented sacred site. It helps that the site is located on the Nez Perce-Clearwater National Forest, so additional federal permits are required.

Conclusion

In summary, the Nez Perce Tribe believes that the current regulations should remain in place. The regulations have required project proponents to support the identification of historic properties and sacred sites significant to the Tribe, and the regulations have guided the protection of these sites where possible, or mitigation for adverse effects when it was not. As a result, the Tribe believes that the regulations should be viewed as a success for Tribe and the FCC, which has a

legal responsibility under federal law and Treaties to promote the interests of the Tribe, as well as the broader American public.

Sincerely

Patrick Baird,
Nez Perce Tribal Historic Preservation Officer